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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-238

PAUL C. MOYNAHAN,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TO PETITIONER'S PETITION FOR CERTIORARI

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1. With Respect to Questions Sought to be Reviewed, No. 1:

a. Excerpt from State Supreme Court Record:

"273. . . .

The State offered as its witness Charles Vernale and the following occurred:

Mr. Gaffney: The next witness to be called is Mr. Vernale. His name has been mentioned. However, the State does not feel it could vouch for the veracity of this gentleman, and would ask the court to call him as the court's witness.

There is some authority for it, your Honor, and I would ask that this take place.

Mr. Hennessey: I think, your Honor, maybe we are going to have to ask that the jury be excused again.

The Court: I am afraid so.

(Jury excused)

Mr. Hennessey: Might I state, your Honor, maybe this time, but there is presently in court here Mr. Carolan. Mr. Carolan is the public defender appointed by Judge Barber, and is currently representing Mr. Vernale with respect to these charges.

The Court: The question before the court now is whether or not the court should call Mr. Vernale. I don't believe that this should be done at this time.

It seems to me that you have a right to put Mr. Vernale on the stand and call him as a State's witness, and if he proves to be hostile, then, of course, you have your rights, as you well know.

Mr. Gaffney: Excuse me, your Honor. I am not claiming him as a hostile witness. He had made contradictory statements under oath on various occasions, so, frankly, we cannot vouch for his veracity.

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As I understand the Connecticut law, a side calling a particular party must vouch for his veracity. It is the common practice in the Federal Court to call the witness as a court's witness since he is a necessary witness to the case.

The Court: Is there objection on your part, Mr. Hennessey, to having Mr. Vernale called as a court's witness?

Mr. Hennessey: Well, I would like to say this, your Honor: Before he is brought in front of this jury, I would like it clear in the record that I did not want this man brought in in front of this jury until it has been clearly ascertained in the absence of that jury whether or not he should be permitted to testify, one; two, whether or not he intends to invoke the Fifth Amendment.

I think it would be grossly prejudicial to permit a witness to take the stand and now, in a sense, the burden is being put on the court to call him.

And then, your Honor calls him and he invokes the Fifth Amendment in the presence of the jury. This is extremely prejudicial to us.

The Court: Well, Mr. Carolan is here representing Mr. Vernale.

Mr. Hennessey: I don't know if your Honor wants to address Mr. Carolan directly with respect to his feeling. I should say this, your Honor: It is my understanding, and certainly I am sure the State has not talked to Mr. Vernale in the absence of Mr. Carolan. I would hope not, since they would not have any right to do that under the canons at this point.

I am sure of what Mr. Carolan has told me what his advice would be, since Mr. Vernale is charged in, I understand what was originally a two-count information in which Mr.

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Moynahan was being charged with being a co-conspirator with Mr. Vernale.

That charge, as I understand it, and other charges relating to all these transactions that have been opened up, are cases pending in this court, and therefore, it is obvious that Mr. Vernale's rights would be seriously prejudiced if any inquiry were made.

The Court: But, Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has.

Mr. Hennessey: Well, let me try to explain. I keep going back and forth over the thing.

I am not concerned about Mr. Vernale, your Honor. I am concerned about Mr. Moynahan (Record, pp. 125-7).

Well, just as I was concerned about Mr. Moynahan when the Court saw fit to protect Mr. Miller, to limit my examination of Mr. Miller to the point where I could not make any inquiry. Further, the Court felt sufficiently disposed to protect Mr. Bishop so that I was prohibited from asking questions that might tend to raise my inquiry which would protect my client's rights that I was asking Mr. Bishop in the beginning about.

The Court: I don't see where that has anything to do with the issue at hand, Mr. Hennessey.

Your right of cross-examination of either of the two gentlemen you mentioned was not limited beyond what I thought were unreasonable limits.

Now, it seems to me that the comment that you make is a very improper one.

Mr. Hennessey: If it is improper, I apologize. I don't intend it to be so.

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The Court: It is the duty of the Court to make rules on evidence and to what limits you may go on cross-examination, and it is the opinion of this Court that you were given every latitude possible on cross-examination within reasonable limits.

Mr. Hennessey: I am not questioning your Honor's rulings.

The Court: I don't think your remarks at this time are proper.

Mr. Hennessey: If that is so, I apologize. My point was not to question your Honor's rulings. I understand that that is your Honor's function, and your Honor has so ruled.

The thing that I am expressing to your Honor is that when Mr. Bishop was here the concern was that Mr. Bishop might be asked questions—

The Court: Mr. Hennessey, you have no right to be concerned with Mr. Vernale's rights. That is not your function as defense counsel for Mr. Moynahan. You have no standing to even make these comments to the Court.

Mr. Hennessey: Well, excuse me, your Honor, I would submit with all due respect, that I do have standing to make comments with respect to a witness sought to be tendered by the State.

The Court: The State has a right to call anybody. The State has a right to call you. The State has a right to call me as a witness, if necessary.

You have no rights there.

* * * * *

The Court: We will take a short recess, Sheriff.

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(Court resumed — still in the absence of the jury):

The Court: Gentlemen, I am not completely satisfied that a pre-trial or what we call a dry run of Mr. Vernale's position in this case is proper. If you gentlemen agree that it should be done, I will accede to that request.

Mr. Gaffney: The State does not agree.

The Court: The State does not?

Mr. Gaffney: No, sir, as I understand the line of cases, it does not concern this particular situation.

Mr. Hennessey: I have already made my motion, your Honor, and your Honor has denied it. And just for the record, I have furnished your Honor a line of cases cited, I believe, in 86 A.L.R.2d, 1443, and those cases subsequently decided in the supplement, including the De GeSualdo case, and cases showing to support me, so that your Honor will know on the record that my claim is based on what I believe to be a line of case law in support of that position (Record, pp. 35-7).

* * * * *

Mr. Hennessey: I am claiming, your Honor, that if the State calls a witness with any forewarning that this witness is going to invoke the Fifth Amendment in front of the jury, then I would submit that this would be prejudicial.

The Court: The State has a right to call the witness. If Mr. Vernale wants to invoke the Fifth Amendment, that is up to Mr. Vernale. Then the court must make a determination as to whether or not he must answer. But the regular procedure is that the State has a right to call any witness it sees fit.

Mr. Hennessey: Well, I am expressing that as a ground of objection, your Honor, and in making a request that your Honor make inquiry in the absence of the jury to determine whether or not such an invocation of the Fifth Amendment

is going to be made, so that it will not occur in the presence of the jury. That is, I make that motion, your Honor.

The Court: Your motion is overruled.

Mr. Hennessey: Exception, your Honor.

The Court: Exception may be noted.

Following this ruling and while still in the absence of the jury, the following occurred:

The Court: . . . Now, gentlemen, do you claim that the court has a right to call this witness?

Mr. Gaffney: Yes, sir.

The Court: I would like to see some authority on that. I am not aware of it.

Mr. Gaffney: Well, if the court please, I think the general authority is that a party must vouch for the veracity of its witnesses. In other words, we must vouch for the truthfullness of Mr. Vernale if we call him, and frankly we cannot do that, and we represent that to the court.

The Court: You don't even know if he is going to balk as a witness?

Mr. Gaffney: No, I don't know.

The Court: You don't know if he is going to testify friendly?

Mr. Gaffney: That is correct.

The Court: Or be hostile, or is going to invoke his privilege?

Mr. Hennessey: I did want to make it clear that my information is that the advice of Mr. Vernale's attorney to Mr. Vernale will be to invoke his privilege against self-incrimination. And it appears from the fact that the State

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has expressed this prior concern, is an indication to me that they have at least a belief that he may do this, or he may not.

* * * * *

The Court: Well, the public defender is here to protect Mr. Vernale's rights.

I am going to summon the jury into the courtroom, gentlemen, and ask you to call any witness you intend to call, and then we will proceed from there. . . .

Mr. Hennessey: Excuse me. Could I state so as to make the record clear, your Honor, I apologize for being so lengthy, but my position is that your Honor's references to the invocation of the Fifth Amendment and subsequent use of statements is, as I recognize, covered by the case of *Pointer* vs. *Texas*, 380 U.S., which deals with the Sixth Amendment, the right of confrontation of the defendant.

I am likewise invoking the Fourteenth Amendment and due process rights of a defendant in claiming that in a situation where the court has a forewarning of the intention of a person who is related to the transaction, who is or was a co-indictee or is mentioned as a participant in the crime that is involved, that when that situation arises, and further, where it is clear on the record that the man has a valid reason for invoking the privilege in that he is presently under arrest and charged with crimes related to the very situation that is in issue here, that under those circumstances it is my position that the court should make an inquiry in advance, in the absence of the jury, to make the determination as to whether or not this privilege is to be invoked, since the invocation of this privilege in the presence of the jury would constitute prejudicial error, and I claim it under the Fourteenth Amendment.

The Court: The only question before me is whether or not the State has a right to call Mr. Vernale as a witness. It would seem to me that the State does have that right.

Now, what happens from that point on is a matter to be determined depending upon his answers.

Now, that is the way the court feels at the moment, unless you could show me otherwise.

Mr. Gaffney represents to the court that they have no way of knowing what his position is going to be, and in view of that representation I don't see why we should proceed in any other different fashion.

Summon the jury.

Thereafter, in the presence of the jury, the following occurred during the testimony offered by the State:

Charles Vernale identified himself as being in State's Prison where he has been for 13 months. He stated that he had known Paul Moynahan for 6 or 7 years and that their relation was one of strict friendship. There followed the following questions:

Q. And tell the ladies and gentlemen of the jury something about your friendship. What did it involve or entail, for example? A. I would like to take the Fifth Amendment on that for the simple reason I don't want to incriminate myself in any way. This is not my trial.

Q. All right. Were you ever an informant for Mr. Moynahan? A. Never, I was never an informer.

Q. Did you ever give him any information of any kind concerning criminal activities? A. I take the Fifth Amendment on that. I don't want to incriminate myself in any way, also.

Q. Did you ever make a gift of a television set, a color television set to Mr. Moynahan? A. I take the Fifth Amendment on that. I don't want to incriminate myself.

The Court: At this point the jury is excused.

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Gentlemen, I shall take a short recess at this point and ask the guards here to return Mr. Vernale downstairs until I resume court.

Short recess, Sheriff.

(Recess)

(Court resumed)

The Court: All right, you may proceed, Mr. Secor.

Direct examination by Mr. Secor:

Mr. Secor: Under the circumstances, we have nothing further of this witness" (Record, pp. 127-31).

b. Excerpt from Defendant's State Supreme Court Appendix:

" ARGUMENT OF THE STATE

* * * * *

REBUTTAL ARGUMENT

* * * "And Charles Vernale was asked, 'Did you give the defendant, Paul Moynahan a color television set? Did you deliver it to him?' And he took the Fifth Amendment. He is not a very great guy" (T. 1969). * * *" (Appendix, p. 32a).

c. Excerpt from State Supreme Court Record:

" ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

23. In rejecting the defendant's motion for voir dire examination and in admitting the testimony of Charles Vernale as set forth in paragraph 273 of the finding" (Record, pp. 215, 219).

2. With Respect to Questions Sought to be Reviewed, No. 2:

a. Excerpt from State Supreme Court Record:

"294. The State offered as its witness, Edward Miller, ... Thereafter in the absence of the jury the following occurred:

The Court: All right. Now gentlemen, with respect to the issue as to what length defendants may go in the cross-examination of Mr. Miller, I would like to hear Mr. Hennessey first.

Mr. Hennessey: We would seek to cross-examine Mr. Miller to establish a fixed motive in his mind which would be indicative of untruthfulness. The motive which we would seek to establish is that Mr. Miller, during the course of the one-man Grand Jury investigation that was conducted here in Waterbury with respect to one single claim which is some form of a conspiracy to steal and sell stolen color television sets was in fact himself investigated by this Grand Jury with respect to his transactions with stolen color television sets. And that inquiry was made not merely of him as an independent witness to possibly testify as to some facts relevant to this case, but also that he was focused on as a potential accused, because of the fact that evidence was available to the police which would indicate that he was a seller of television sets himself, which sets were subsequently determined to be stolen.

We know from our own investigation of three instances where Mr. Miller sold stolen color television sets to individuals in the Waterbury area, Mr. Stevens, Mr. Gaspari and Mr. Lanza. It is our understanding as well that one of these gentlemen at least, was subsequently charged by the State's Attorney's office with the crime of receiving stolen goods, based upon the fact that he did receive a stolen color TV set from Mr. Miller.

With Respect to Questions Sought to be Reviewed, No. 2

However, to the best of our knowledge, Mr. Miller was not charged, although he, in fact, was the seller.

* * * * *

We place great emphasis in our own minds upon the testimony of Mr. Miller since standing at present un-cross-examined as he is, he would appear to a jury to be merely a man involved in the repair of television sets who did in fact at the behest of the individual, Mr. Moynahan, go to that home and repair this particular set, and so identifies it.

It therefore becomes crucial evidence as to the question of whether or not this set was ever in fact in Mr. Moynahan's home.

* * * * *

But the point that I tried to make is that where evidence exists which would establish a fixed motive in the mind of a person to lie or possibly to testify for the State that such motive can be developed through proper evidence to establish that he would have a reason for testifying as he does. The reason we would submit here is that Mr. Miller is concerned over his own career and his own life, and that he does not want to be charged, even though there is evidence to establish that he was in fact a recipient and a subsequent seller for money of stolen sets.

* * * * *

(Record, pp. 202-4).

We would claim that the law in this area is set forth first in relying for basic text, Wigmore on Evidence, Section 967. This basic section deals with testimony of accomplices and co-indictees in a criminal case.

The basic doctrine applies to numerous cases involving such situations where a witness is put on the stand and then on cross-examination evidence is sought to be elicited to show that by reason of some threat of criminal sanction

or some pending criminal matter, he would have a motive to lie.

* * * * *

Mr. Hennessey: In the pocket supplement addenda to 967 was added, and the note is relevant here: 'Apart from accomplices and co-indictees, a witness in a criminal case, as well as in a civil case, may have a motive to testify falsely about a particular matter. No useful purpose would be served in undertaking to enumerate even some of the innumerable motives that may exist. Suffice it to say that evidence of such motive is to be distinguished from that which merely tends to discredit the witness generally.'

* * * * *

Mr. Hennessey: These are cited in the note, *United States* vs. *Lester*, 248 F.2d 329; *United States* vs. *Masino*, 275 F.2d 129; also, a Second Circuit case, and in particular, *People* vs. *Mason*, which is a 1963 Illinois case, 281 Illinois 2d 396, and a citation which is available in this library, 192 N.E. 2d 835.

The Court: Those are pretty old cases.

* * * * *

'However, showing interest or bias on the part of a witness is also an accepted method of impeachment, and even in jurisdictions where evidence of arrest or indictment is not ordinarily admissible to impeach credibility generally, the fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias, or a motive to testify falsely.'

The Court: Well, I think I heard a statement here this morning to the effect that Mr. Miller had not been arrested nor had he been indicted.

Is that so, Mr. Secor?

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Hennessey: I don't know. I would have to defer to the State on that.

Mr. Secor: This is correct.

* * * * *

The Court: How far can you go to cross-examine him, say, where there is a potential arrest where his Constitutional rights may be infringed upon?

Mr. Hennessey: Well, the issue is this, your Honor: I believe that the question of Mr. Miller's Constitutional rights are a matter of concern to him, not to me. If Mr. Miller is asked a relevant admissible question, the answer of which might infringe upon his Constitutional rights, then the Constitution does not compel him to answer it. This is not the same thing as prohibiting an advocate from asking.

The Court: That is where the court's concern is.

Mr. Hennessey: And Mr. Miller's concern comes into play, not that I should be precluded from asking him, but rather should he be protected from answering, if, in fact, he chooses to stand on his Fifth Amendment rights by reason of the fact that he feels such an answer would tend to incriminate him. That is his right, and he has a right to invoke it and I certainly gainsay but that is not the same thing as my right to cross-examine him (Record, pp. 204-5).

* * * * *

The case of Masino, which is in 275 F.2d, also, I believe, tries to articulate the distinction which I am attempting to draw maybe inarticulately, which is that the question of cross-examination and the latitude allowed to the lawyer in the defense of criminal accused, is extremely broad, that it is, I think, if any weight is going to be given to one side or another, the weight would lie in favor of the defendant in a criminal case.

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I will read from a Connecticut decision pertinent to that point.

The issue in the Masino case indicated the question of an inquiry about charges that were dropped after a man took a plea, and those were excluded, and the Courts holding that was prejudicial error, also indicated that such evidence was admissible when the basic question is of possible motive to falsify his testimony. And they pointed out that the distinction is not whether or not someone is trying to get in an arrest, but rather whether or not the evidence merely of arrest would be such as to indicate motive on the part of a person.

The right of cross-examination has been recognized in Connecticut most recently in the case of *State* vs. *Luzzi*. I will withdraw that. That is not accurate. It has not been recognized most recently, but the point which I am trying to stress was probably stated best in *State* vs. *Luzzi*, which is 147 Conn. 40, a 1959 decision.

* * * * *

. . . . the Court pointed out: "Cross-examination to elicit facts which tend to show motive, interest, bias, or prejudice is a matter of right, and although the extent of such cross-examination may often rest in the sound discretion of the Court, a denial of the right, or its undue restriction, will constitute reversible error."

* * * * *

'It is generally held that cross-examination for this purpose is a substantial legal right which may not be abrogated or abridged at the discretion of the Court to the prejudice of the cross-examining party.'

* * * * *

The question merely is whether or not the defendant is given an ample opportunity to develop, through cross-examination, those aspects of this person's knowledge which

would be crucial, in our opinion, crucial to the establishment and placing of Mr. Miller in his proper perspective in this entire transaction, so that this jury will not walk away merely with the idea that, well, this is Mr. Miller who is a TV repairman, and went in there. Why would he lie? He is not even involved in the case. Because we certainly submit that he is involved, or that the Grand Jury had established enough evidence to show his involvement (Record, pp. 25-30).

* * * * *

Mr. Gaffney: I would answer assuredly, Your Honor, the mere fact that he had been arrested would not therefore be admissible. We are going even further, as your Honor noted, that we don't even have an arrest in this case. We have a suspicion, if that be the testimony before a Grand Jury, and clearly the State would argue that this matter also would be inadmissible in order to impeach the credibility of this witness, your Honor.

I think, if the court please, and recalls the testimony of Mr. Miller presented this morning, it was of a very limited scope. He was confined solely, as counsel will relate, solely to the repair of a TV, and it is in the defendant's home, and it was confined to that, with that particular purpose in mind. Granted the scope of the inquiry of the Grand Jury was much broader in respect to Mr. Miller, but this does not affect this particular defendant, and the State would object to it.

The Court: Do you agree, Mr. Gaffney, questions relating to motive, bias, prejudice, design, on the part of a witness would be properly admissible on cross-examination?

Mr. Gaffney: No question, sir.

The Court: Even though they may be unrelated to the direct testimony, they are still admissible to affect the credibility of his testimony?

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Gaffney: Yes. However, the State would argue that an arrest or mere suspicion does not mean interest or bias with regard to a witness on the stand.

The Court: All right. Anything else, gentlemen? (Record, p. 205).

* * * * *

Mr. Hennessey: I would be glad to state I would like to know whether or not Mr. Miller was friendly with Mr. Vernale since when this case started Mr. Vernale's name was only incidental, but through Mr. Bishop I think his name has clearly been inserted into the case and is obvious.

There can be no doubt in the jury's mind, I don't think, that Mr. Vernale was running a place up in his garage where TV sets were going in and out.

If that part of Mr. Bishop's testimony is believed, it has been injected and it is in the minds of the jury.

I would like to inquire from Mr. Miller as to his business dealings with Mr. Vernale. I would like to determine, for example, whether or not some of the stolen television sets which were subsequently resold by him did not in fact come from Mr. Vernale. I have tried through two TV men, merely in anticipation of Mr. Miller's arrival, to show how a legitimate dealer in television sets gets his television sets and how he gets documentation of it. And part of the reason I brought that out through Mr. DeMartin and Mr. DeCaprio was to show how reputable businessmen work, how they deal in sets, and to show that Mr. Miller's transactions were somewhat different, such that he was placed under suspicion, that he was questioned.

That, I think the man, frankly, whether or not the State has elected to take action against him as yet does not preclude the fact that they may.

I don't know what the State's Attorney in this county does or does not do. I do know we have already seen, I

think, some indication through Mr. Bishop that Mr. Bishop was here waiting seven months to be sentenced which I cannot honestly believe was the fault of his attorney or the Court or any intention to leave Mr. Bishop languishing in the Montville Jail.

I think that it was done by the State's Attorney because of their intention to use him in this case and determine, based upon his cooperation in this case, what punishment he is entitled to.

Now, I think, also, the case law as shown, and I think cases are cited in Wigmore to make it clear that evidence of that type is clearly admissible where you have a man such as Mr. Bishop on the stand.

We are only drawing a slight degree between Mr. Bishop and Mr. Miller. Mr. Bishop admits to a lot of things, but I think the point is that the cross-examination that I understood of him was intended partly to show that there were reasons.

I think if I have proper time to give your Honor cases which would show that a charge to the jury that a man has not been sentenced is a matter to be considered by the jury in weighing his testimony.

Now, I only point that out because, as I understand the way the State's Attorney's Office operates in this county, and it is not that more unusual than other counties, such as New Haven. They decide who gets arrested, and I think that was so in this case. I think they made the decision as to who got arrested and who got charged, and who did not.

I think it is clear to me, and I think the State would have to admit they knew Mr. Bishop had confessed to a lot of things that he was not charged with, and I think in candor that I can state that he is not going to be charged now, because I think he has paid his bill.

With Respect to Questions Sought to be Reviewed, No. 2

So, whether or not Mr. Miller has been charged here, I don't think is the sole criterion. The fact that he was under investigation, the fact that he was implicated, and the fact that he very well could be charged after this case is all over, I think is germane. (Record, pp. 31-3).

* * * * *

Thereafter the Court directed the defendant to conduct a voir dire in the absence of the jury, at which time the following occurred.

Q. And at any subsequent time after that first inquiry, were you told by any member of the police, or any member of the State's Attorney's office that you were under investigation?

* * * * *

Mr. Gaffney: Objection.

The Court: The objection is sustained and the answer may go out. The question is excluded (Record, p. 206).

297. Q. All right. When you obtained the sets from Mr. Vernale did you receive any invoices?

Mr. Gaffney: I object, your Honor.

The Court: Yes, we are going far afield now. I will sustain the objection (Record, p. 208).

* * * * *

200. "Mr. Hennessey: Well, I asked the question, did I not, about the price, and if I am correct, your Honor sustained the objection to my question as to how much he paid Mr. Vernale for those two sets?

The Court: Yes, I think I sustained the objection to that question."

Thereafter the following ruling was made by the Court:

"Mr. Hennessey: But I would only ask that you permit me to have those portions of those questions which we have asked here be presented to the Court as an offer of proof.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Any objection to that?

Mr. Gaffney: No objection.

The Court: Very well. It is so ordered.

Mr. Hennessey: And so that the record would be clear, I then take exception to your denial of permitting me to introduce those few questions.

The Court: Exception may be noted" (Record, p. 34).

b. Excerpt from State Supreme Court Record:

"292 . . .

Thereafter the defendant offered as its witness Mr. Carl Stevens, who testified that he was the owner of Stevens Company and lived in Thomaston. Thereafter the following occurred:

Mr. Secor: Your Honor, the State has reason to anticipate what this offer is about, and we would like to be heard on it in the absence of the jury.

The Court: The jury may be excused.

(Jury leaves courtroom.)

(In the absence of the jury:)

The Court: I will hear you, Mr. Secor.

Mr. Secor: We may be anticipating, but out of an abundance of caution, we want to make it clear that if this witness, if it is contemplated to interrogate this witness about the purchase of any television sets from Edward Miller, that it is irrelevant, completely immaterial, and has no part in this case, and it is not permissible under the very brief that the defendant submitted yesterday, attacking the character of a witness. And we want to make that clear.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Mr. Hennessey.

Mr. Hennessey: Mr. Wade is going to examine.

The Court: Mr. Wade, what is the purpose of this?

* * * * *

We do intend to explore the purchase of the set from Mr. Miller.

The Court: Is that set related in any way to the transaction under consideration?

Mr. Wade: It is related to testimony in the case, your Honor. Mr. Miller has testified when he was put on as a State's witness that he sold a color TV set to Mr. Stevens and he sold another color TV set to a Mr. Gaspari.

We have Mr. Gaspari standing by as another witness and we intend to explore when the set was purchased, by whom, where it is now, and that is the extent of our examination.

Mr. Secor: And we consider that highly improper, irrelevant, and immaterial in this case, and you and we know, your Honor, what the objective here is. They weren't able to attempt to attack Miller directly on the stand because of the law, and now this is a circuitous route to try to get about the same way, and there is case law that even though Miller, even though he could have been cross-examined about this very matter when he was on the stand, there is case law that independent proof through other witnesses concerning that matter cannot be offered.

Now, in the Miller case, he wasn't even able to be cross-examined about it under the law, and certainly they cannot drag in via the back door outside witnesses about the purchase and sale of sets that have nothing to do with this case.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: Are you claiming that the set which was sold by Mr. Miller to Mr. Stevens is connected in any way with a television in this matter in this case?

Mr. Wade: It is our claim, your Honor, that Mr. Stevens purchased a color TV set from Mr. Miller in approximately June or July of 1967, that subsequently that set was removed from his house by the State Police and he was advised that the set had been stolen. We have testimony from Mr. Miller that he received the set that he sold to Mr. Stevens from Charles Vernale. We have testimony from Mr. Miller that he received the set he sold to Mr. Gaspari from Mr. Vernale.

Therefore, it is our claim that we can approach the question of Mr. Miller's bias or interest in this case by revealing to the jury that he, himself, was dealing in stolen color TV sets.

We feel that by presenting the simple evidence through Mr. Stevens, that he bought a set that Mr. Miller admitted purchasing from Mr. Vernale, that the jury will be entitled to draw an inference as to Mr. Miller's own connection with stolen color TV sets.

* * * * *

Mr. Wade: Yes, your Honor. I would state for the record that we have agreed at least to pursue the line of inquiry that we discussed with your Honor and counsel in chambers, in the absence of the jury, so that we can preserve our record to show the line of inquiry had we been allowed to explore it.

And I would, therefore, ask to put Mr. Stevens on to indicate on the record the questions and answers that we intended to elicit, albeit in the absence of the jury .

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Wade: My recollection, your Honor, is that he moonlighted on repairs, that he went out on weekends and did repair jobs for which he did not account to his company because this was on his own time, and sometimes these repairs were referred to him by Mr. Vernale.

But my recollection is not about sales, as far as I can recall, Mr. Miller indicated, as far as the sales of TV's were concerned, this was Miller & Fellin business.

* * * * *

Mr. Secor: . . .

Certainly, in any case, we are on a collateral issue in an attempt to contradict this man on a collateral matter.

The Court: I am inclined to believe this is so, Mr. Wade. I think if you make your statement for the record as to what the offer of proof would be that that would suffice, rather than have the record indicate the questions and answers which would be put to Mr. Stevens.

Mr. Wade: Well, I would offer Mr. Stevens to show he knows Edward Miller of Floral Nook Drive, Waterbury; that he knows he works for Miller & Fellin Television Company; that he bought a color TV from Mr. Miller in about July of 1967, for a price of $549., a Motorola console TV, and that he made out a check to Miller's TV, which was endorsed Miller's TV, Edward Miller, and that Mr. Stevens will further testify that he no longer has this set, that the set was taken from his house, impounded from his house by the Connecticut State Police. And he was advised by the State Police that the set itself had been stolen. He no longer has the set and has not had it since the Connecticut State Police impounded it.

* * * * *

Secondly, we claim it on the theory of bias, interest and motive, with regard to the testimony of Mr. Miller. We

would intend to offer this line of evidence to show that in fact he was dealing, he was selling stolen color TV sets.

* * * * *

Mr. Wade: Subject to connecting it up, we can recall Captain Bishop, to put him on the stand to testify as to the result of his investigation, to testify where he thinks the stolen set obtained from Mr. Stevens was stolen from, and who stole it.

* * * * *

The Court. I think in order to preserve the record, probably maybe we ought to hear Mr. Stevens, that is to say, on a dry run. And then there will be no question in the event of an appeal, as to what the testimony would have been. I think we ought to hear what Mr. Stevens has to say, in the absence of the jury.

Put Mr. Stevens on.

* * * * *

Q. Will you give your name and address for the record? A. Carl R. Stevens, Thomaston, Connecticut, Major in the Signal Corps., owner of the Stevens Company in Waterbury.

Q. Do you know Edward Miller, 19 Floral Nook, Waterbury? A. I believe that is his address. I know an Edward Miller, yes.

Q. Is this the Edward Miller who works for Edward... for Miller & Fellin TV Company? A. Well, I didn't know but what he was in business for himself or with somebody else.

Q. Did you buy a color TV set from Mr. Miller? A. Edward Miller was up to the house repairing the old set and he said, 'Don't you think it is about time to get a new one?'

With Respect to Questions Sought to be Reviewed, No. 2

Q. Did you buy one from him? A. Yes. I said, 'Well, bring me one'.

Q. Can you recall— A. Eddie always did my repair work.

Q. Can you recall the approximate date that you purchased this set from Mr. Miller? A. It was paid for within a few days after that, and this is the check.

Q. Look at the check and tell us the approximate date. A. July, 1967.

The Court: July what? What was the date,

The Witness: That is the funny part, I couldn't tell you unless the bank can tell you on that.

By Mr. Wade:

Q. All right. Now, can you tell us how much you paid for it? A. I paid $549.

Q. Can you recall what kind of a set it was? A. It was a Motorola.

Q. Table model, floor model, console or what? A. It was a console.

Q. Floor model? A. Yes.

Q. Can you recall its color? A. What?

Q. What color was it? A. Probably a walnut, or something like that. I couldn't tell you right now.

Q. Now, did you pay for this television by check or by cash? A. By check.

Q. Do you have the check with which you paid for the set with you? A. The check was right here.

Q. Do you have the check with you? A. Yes, right here. That is the endorsement on the back.

With Respect to Questions Sought to be Reviewed, No. 2

Q. This is the check you paid Edward Miller with for the TV? A. Yes. He came around a couple of days after and I paid him.

Mr. Wade: May this be marked for identification?

The Court: It may be marked for identification, Defendant's Exhibit 17.

(Document referred to marked Defendant's Exhibit 17 for Identification).

By Mr. Wade:

Q. To whom was the check made out, Mr. Stevens? A. Miller TV.

Q. Did you give the check to Edward Miller? A. He got it, and he cashed it.

Q. Was it endorsed? A. It was endorsed right on the back, 'Miller TV, Edward Miller'.

Q. All right. Now, do you still have that color TV set? A. No.

Q. Was it removed from your house? A. The State Police and the Thomaston Police moved it from my house, and I had to go buy a new one.

Q. Can you recall when it was removed from your house, approximately? A. Well, it was removed from the house just about March, the early part of March, because I bought a new television.

Q. What year, sir? A. 1969.

Q. All right. And when the police removed it from your house, did they give you a receipt for it? A. No.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 2

Q. Were you advised by the police why the set was removed from your house? A. They said that it was a stolen set, and they would have to take it.

Mr. Wade: All right, that is all.

The Court: All right. Is that it, gentlemen?

Mr. Secor: No questions.

The Court: All right, the objection is sustained. The court rules that this testimony is inadmissible at this time. It leads into collateral issues.

Mr. Wade: I would ask: Are you sustaining the objection to all the evidence, or may the question of the signature on the check as Miller TV and the endorsement Miller TV Edward Miller, come in to show inconsistency with Mr. Miller's testimony, as to how he was doing business?

Mr. Secor: I will object to this, if the court pleases.

The Court: I am going to sustain the objection because the testimony is nothing inconsistent with what Mr. Miller has said, so far as my recollection goes. That sometimes he did work under his own name. That was my recollection. I may be wrong, but I am going to sustain the objection.

Mr. Wade: May we have an exception?

The Court: Exception.

Mr. Wade: We will retain this check.

The Court: You may step down, Mr. Stevens.

(Witness excused).

Mr. Wade: I would like the record clear that we are excepting to the ruling, on the overall ruling on the evidence as well as to the specific question of whether or not the evidence could come in on how Mr. Miller was doing business.

With Respect to Questions Sought to be Reviewed, No. 2

The Court: The ruling of the court is, gentlemen, that the testimony of Mr. Stevens leads into collateral issues and that it is irrelevant at this time.

Mr. Wade: Now, while the jury is still excused——

The Court: I would also like to state for the record, it seems to attack the credibility, it seems to attack the credit of Mr. Miller and that credit cannot be attacked in this fashion. It seems to attack the character of Mr. Miller, and it cannot be done by specific acts. It must be done by general reputation.

Mr. Wade: While the jury is still excused, we have a Mr. Gaspari standing by. We would offer Mr. Gaspari on the same basis as Mr. Stevens, for the purpose of a set which was subsequently proven to be stolen.

The Court: Can we agree, gentlemen, that his testimony is substantially that offered by Mr. Carl Stevens?

Mr. Wade: I can agree to that. I don't know if the State could.

Mr. Secor: As far as I know, that is all he could testify to, your Honor.

The Court: In that event, I take it there is objection.

Mr. Secor: There is.

The Court: The objection will be sustained on the same ground.

Mr. Wade: Note an exception.

The Court: An exception may be noted" (Record, pp. 181-195).

c. Excerpt from the State Supreme Court Record:

"293 . . .

The Court: You are getting plenty of exercise today. All right, you are excused.

With Respect to Questions Sought to be Reviewed, No. 2

(Jury leaves courtroom).

The Court: All right. Now, what is the name of this gentleman?

Mr. Wade: Mr. Daniel Fellin.

* * * * *

Daniel Fellin, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Daniel Fellin.

The Clerk: And your address?

The Witness: Mt. Tobe Road, Terryville.

The Court: What is the offer of proof here, Mr. Wade? (Record, pp. 58-9).

* * * * *

Mr. Wade: Then, once again, for the record, I would ask to be permitted to inquire of Mr. Fellin about this business relationship.

The Court: I think you can make an oral statement, an offer of proof, without going into a dry run again, because we have to move along here.

Mr. Wade: All right.

Then, my offer of proof through Mr. Fellin would be that when this corporation was formed several years ago—I am not certain of the exact number of years ago—that nearly all of the risk, meaning the capital money put into the corporation, came from Mr. Fellin; that the contribution of Mr. Miller was essentially know-how and ability to work on TV sets.

The Court: All right. No. 1, that is a collateral issue. Now, take each one separately. Go ahead.

With Respect to Questions Sought to be Reviewed, No. 2

Mr. Wade: Secondly, we would offer evidence through Mr. Fellin that having examined his books and records for the year 1967, approximately thirty-odd television sets were sold by Miller & Fellin Company.

The Court: That is a collateral issue. Next.

Mr. Wade: This examination of these books and records for the year 1967 would reveal that no television set was sold by Miller & Fellin TV either to Mr. Stevens or Mr. Gaspari.

The Court: That is a collateral issue.

Mr. Wade: Secondly, it would show the examination of Mr. Fellin would show, an examination of all of his books and records reveals no evidence by Mr. Miller of sales of TV's on his own behalf, or as Miller TV.

The Court: That is a collateral issue" (Record, pp. 200-1).

d. Excerpt from Defendant's State Supreme Court Appendix:

"ARGUMENT OF THE STATE

MAIN ARGUMENT

* * * "There is one man in this case that we can believe, if anybody, Ed Miller. This is the one man that we know is telling the truth" (T. 1904). * * *

* * * * *

REBUTTAL ARGUMENT

* * * * *

. * * * "Now Vernale and Bishop are no prizes, but what about the other witness Edward Miller. The defense has tried to

With Respect to Questions Sought to be Reviewed, No. 2

get at him but had a hard time trying. You should believe Ed Miller because he has no axe to grind in this case. He has no possible motive to tell an untruth" (T. 1970). * * * "Why would Ed Miller do a thing like this? He was merely questioned by the State Police. He was subjected to intensive cross-examination, which must have been unpleasant. And he only got involved because he was interviewed, since there is not one shred of an indication as to his being motivated to do harm or damage to the defendant. Therefore, you should believe him (T. 1971). * * *" (Appendix, pp. 32a, 33a).

e. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

19. In requiring a voir dire examination prior to cross-examination of State's witness Edward Miller and in rejecting the defendant's proposed cross-examination as set forth in paragraph 294, 295-296, 297 and 299 of the finding and paragraph 200 of the draft finding.

* * * * *

31. In requiring a voir dire examination of and in rejecting the testimony of Carl Stevens, Eugene Gaspari and Daniel Fellin as set forth in paragraph 292 and 293 of the finding" (Record, pp. 213, 218-220).

With Respect to Questions Sought to be Reviewed, No. 3

3. With Respect to Questions Sought to be Reviewed, No. 3:

a. Excerpt from State Supreme Court Record:

"264. Thereafter while testifying on behalf of the State, Captain Bishop stated that on February 8, 1969 he, State's Attorney McDonald and various police officers interviewed the defendant. He further stated that the interview was recorded on a tape recorder. Such statement was furnished defendant pursuant to his pre-trial motion. Thereafter the following occurred:

* * * * *

Q. And what did the defendant tell you about Charles Vernale and John Bishop?

Mr. Hennessey: I will object to that, your Honor. I think, first of all, the State has the statement in its possession as to what was said or wasn't said and, second, there is no limitation here as to time.

The question involved here in this charge, and the only charge we have pending in this court is the charge relating to a transaction on or about April 8, 1967.

The Court: Well, I suppose there is going to be an offer of connection.

Mr. Secor: Of course, it will, your Honor.

The Court: On that ground I will allow it.

Mr. Hennesey: Further, I would also object to it again as being hearsay.

The Court: Hearsay?

Mr. Hennessey: Yes, your Honor, hearsay.

The Court: With the defendant present at the conversation?

With Respect to Questions Sought to be Reviewed, No. 3

Mr. Hennessey: Yes, your Honor, that is right.

Mr. Secor: This is clearly an admission, your Honor.

The Court: The objection is overruled on that ground.

Mr. Hennessey: All right. Exception, your Honor.

The Court: Exception.

A. He told me a number of things, that he had a long association with Charles Vernale and that he knew Vernale was receiving stolen goods, and he knew that John Bishop was doing jobs in the State.

* * * * *

265 . . .

Q. What kind of jobs? A. Breaking and enterings.

Q. And did he tell you what John Bishop was doing with the fruits of his breakings and enterings? A. He, in his own words, said that 'Bishop was the guy that Charlie used, so I understand.' Those were his own words, for receiving stolen goods in Waterbury.

Q. Did he indicate over what period of time Vernale and Bishop were operating in this theft ring? A. Precisely? I don't recall whether he said a precise time or not but he indicated he had knowledge of it for some time.

Q. Did he indicate that the operations had preceded April of 1967? A. Yes, sir, he did.

Q. Did the defendant, Moynahan, ever tell you whether or not he had ever seen John Bishop, himself? A. He did tell me he saw him and he told me he met him.

Q. Where? A. He told me he saw him in Vernale's yard, backyard at his home, and he also told me at another point in the conversation that he met him at Vernale's when he, the defendant, was with a Lieutenant Healy of

the Waterbury Police Department, and was introduced to him.

Q. Was there any indication by the defendant as to the time when he met Bishop and saw him? A. He said it was a warm day.

Q. I am talking of the year. A. It would have been around 1967.

Mr. Hennessey: Well, I am going to move, your Honor, to strike all this testimony. We were given a copy of this statement that Mr. Moynahan gave, pursuant to your order for disclosure and production and now the Captain—I sit here and I have read this statement many times and it is difficult for me to find in the statement the things that the Captain is saying here.

Mr. Secor: That is proper cross, if he has something to quarrel on that. That is proper cross-examination. The Captain is entitled to say what he remembers in this interview.

Mr. Hennessey: Well, I submit, your Honor, we were given a copy of what we believe to be the exact transcript of what transpired in the interview between Paul Moynahan and Captain Bishop and Sgt. Courtney and the other people under the Captain's control. We have that in our possession.

The Court: Well, I think your objection, Mr. Hennessey, on this particular point goes to the weight rather than to the admissibility of this offered evidence.

The Court: All right. I am going to allow the evidence, Mr. Hennessey. You may have an exception (Record, pp. 108-111).

* * * * *

With Respect to Questions Sought to be Reviewed, No. 3

268 . . .

Thereafter Captain Bishop continued to testify as to the statement made at the February 8, 1969 interview with the defendant.

Q. Going bask to the interview of February 8, 1969, did the defendant indicate at any time during that interview anything concerning the activities of Charles Vernale in Waterbury? A. Yes, he indicated that Charles Vernale's home was one of the stops for people who had stolen goods that they might want to dispose of and that he was receiving stolen goods at his home.

Q. Did he indicate whether or not there was receiving of stolen goods at Vernale's home on East Farm Street resulting from breaks in Waterbury? A. He indicated that they were not from breaks in Waterbury.

Q. What did the defendant say about that? A. That he had an arrangement with Vernale, if anybody came around to try to peddle anything, to call him and he didn't want him to buy the stuff but he said to call him and tell him who peddled it, and indicated that this was stuff outside the City of Waterbury.

Q. I don't follow you. A. That is my recollection.

Q. You say this was stuff outside the City of Waterbury?

A. This was property stolen outside the City of Waterbury brought in to Vernale.

Q. Well, was there any conversation about property being stolen in Waterbury and fenced through Vernale? A. There was some discussion about it and, as a matter of fact, the defendant indicated that with Vernale they had arranged to set up Bishop for an alleged break he was to commit in Waterbury but the defendant said it was turned over to the traffic people and they muffed it, he said.

With Respect to Questions Sought to be Reviewed, No. 3

Q. Do you remember anything else about breaks in Waterbury and fencing of property at Vernale's; whether he would fence this or not? A. My recollection is that he did say stuff, stolen property, would be fenced through Vernale that was stolen in Waterbury but he didn't have any knowledge of it.

Mr. Secor: You may inquire.

Mr. Hennessey: Oh, excuse me. I would again, if your Honor pleases, move to strike this testimony as being testimony which is surprise evidence at variance with the information that was furnished to us prior to this trial and in no sense consistent with the statement that was given to us, which is the transcribed statement of the interview that was had between Captain Bishop and his subordinates and Mr. McDonald and Mr. Moynahan.

Consequently, it is my feeling that we are placed in this situation we are now in I understand to be the last day of the State's case, and the testimony he has introduced is a total surprise to us.

I would reiterate, if your Honor pleases, that it is my opinion of the hearsay rule that it excludes any extrajudical statement of any person. Included within that definition of person is a party or a defendant in a criminal case. That where such evidence is going to be introduced, it could only be admitted for those to the extent that it is an admission or a confession.

Finally, I believe what we have had here occur, to my way of thinking, is that rather than use the Captain to testify as to what was the verbatim transcription of a claimed confession or admission elicited from Mr. Moynahan, the State has completely bypassed the Grand Jury minutes and has in a sense used the Captain to impeach that statement so that the situation is reversed wherein

we are given what we understand to be the verbatim testimony of Mr. Moynahan to use for our defense and rather than being required to build a defense to anything that might be in that, we are required to use it to impeach testimony which we claim to be totally inconsistent with it.

The Court: Let me ask Mr. Secor and Mr. Gaffney a question.

Was the complete transcript of the testimony of Captain Bishop given to Mr. Hennessey?

Mr. Secor: The testimony of Captain Bishop?

The Court: I mean the testimony of the proceedings before Justice O'Sullivan.

Mr. Secor: The State will represent that the defendant in this case has had a transcript of his statement given in February (Record, pp. 115-118).

The Court: Of the defendant's statement?

Mr. Secor: Of the defendant's statement given in February that the Captain has testified concerning and of the minutes of his testimony before Chief Justice O'Sullivan for months.

The Court: Without deletion and without omission?

Mr. Secor: Without any deletion. Under the statute he was entitled to it (Record, p. 34).

* * * * *

Mr. Hennessey: My point is the best evidence of that is the statement itself. In other words, the State did—I don't question at all that the State did take a verbatim transcript on February 8, 1969, of questions propounded by Captain Bishop and answers thereto by Mr. Moynahan. And had there been questions asked of the Captain relative to the questions that he propounded and the answers he

received, that would be one thing. But in no sense was the testimony given here testimony with respect to specific questions and answers.

The Court: But Mr. Secor says you got the full transcript; is that correct?

Mr. Secor: Oh, they have had it for months, your Honor.

Mr. Hennessey: Well, my claim, your Honor, is that the transcript itself is a verbatim evidence of what was said between Captain Bishop and Mr. Moynahan.

The Court: Is there any other transcript available? I am not quite sure that I understand his position. Is there anything else available to the State which has not been made available to Mr. Hennessey?

Mr. Secor: No, your Honor. What I understand Mr. Hennessey is quarreling about is he would like your Honor to tell the State how it should present its case. Now, we see fit to present this case of the testimony, the admissions made by the defendant, through the testimony of Captain Bishop on the witness stand, who was present and heard the defendant making the statements. We are not limited to turn in a question and answer in writing like Mr. Hennessey would like to get you to tell us we have to do. We didn't want to do it that way and we don't have to do it that way. And he has got his right of cross-examination, and that is all he is talking about.

If he doesn't like what Captain Bishop says or thinks he is in error in any respect, he has got the transcript of the interview in February and he has got the transcript of the Grand Jury minutes before Justice O'Sullivan and the defense has had them for months and ought to be very familiar with them and in a perfect position to cross-examine this witness, if it wants to.

With Respect to Questions Sought to be Reviewed, No. 3

The Court: All right.

Mr. Hennessey: Well, I will submit further, your Honor, where the State obtains what they claim to be a written confession—

Mr. Secor: We don't make any such claim.

Mr. Hennessey: Where the State obtains what they claim to be a written confession or written admissions, then that document, the written confession or written admission may be introduced in evidence.

The Court: There has not been such a claim. I don't see the point, Mr. Hennessey. Mr. Secor is not making the claim that the defendant made a written confession here which they are withholding from you or any such thing. These are statements which Captain Bishop heard the defendant make at these various times. That is, as I understand it.

Mr. Secor: That is exactly it.

Mr. Hennessey: No. Let me make it clear, your Honor. As I understand it, the State has offered to introduce that he was warned of his rights and then made oral statements. Well, our claim here is that he was warned of his rights and that a verbatim transcript was taken down; that this is the only document which would constitute a confession or admissions; that if, in fact, we were—well, let me put it this way: We were never led to believe that there was a claim that there were any oral statements which were not recorded.

Mr. Secor: And you are not led to believe that now.

Mr. Hennessey: Well, your Honor understands what I am trying to say. If the State takes a written confession and they have it signed, well, I think the best evidence is the written confession. But if you have a written confession and you give it to counsel and then you put a witness on and have him testify as to some oral representations—

With Respect to Questions Sought to be Reviewed, No. 3

The Court: I can't agree with you, counsel. I can't agree with you at all on that point because the best evidence here would be what he heard; that is, what Captain Bishop heard the defendant say. That is the best evidence.

Mr. Hennessey: Well, you understand, your Honor, this is not some kind of a summary or synopsis, the document which was given to us. There was a tape recorder and every word that was said between these two gentlemen or any other member was taken down.

* * * * *

Mr. Hennessey: Well, you must understand what my point is; what I am trying to say is, that it came as a surprise to us, your Honor, in that we assumed Captain Bishop might come here as a witness and he might testify as to: 'Did you ask, would you like to have an attorney present?'

And he answered, 'No.'

All right, now, that is verbatim transcript of what was said but then all of a sudden we realize that there is no attempt being made here to follow that line of questioning. So we are talking, I submit, about two different confessions. And if we are talking about another confession, I submit we have never received a copy of it and it is for that reason I would ask that the court reporter, at his earliest convenience, prepare a copy of that transcript, so your Honor could review the two and find possibly some error or possibly all the things that were said are in this statement.

Mr. Secor: Let me assure your Honor they are in there.

The Court: The objection is overruled. Exception may be noted" (Record, pp. 118-121).

With Respect to Questions Sought to be Reviewed, No. 3

b. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF WAYNE BISHOP

* * * * *

CROSS-EXAMINATION

Exhibit 7 for Identification is a transcript of the February 8, 1969 interview (T. 682). It is a verbatim word for word transcript of the entire interview (T. 683).

* * * * *

On February 8, 1969, Moynahan was informed that the investigation being conducted was of Vernale and his cohorts, i.e., John Bishop, Robert Pinter and an Edward someone (T. 686, 687). Moynahan indicated that he did not want an attorney (T. 687). Moynahan told him that Vernale had been his informant from 1959 through March of 1968 (T. 688). * * * Moynahan stated that he warned Vernale not to buy stolen goods but to tell him if anyone tried to sell goods to him (T. 691).

* * * * *

He stated that he first got suspicious of Vernale and first heard about Vernale possibly receiving after an arrest in the area of Vernale's home on March 8, 1968 (T. 701). Moynahan stated that he never received anything from Vernale (T. 700). He said John Bishop never delivered a set to his home (T. 702, 703). He said he hardly knew Bishop (T. 703). He said he did not know that Vernale was receiving during the period in question (T. 705). He said he never turned his back on anything Vernale did (T. 708). He warned Vernale to keep his hands clean (T. 708). He said that if he knew Vernale were receiving stolen goods he would have arrested him (T. 709). He said he never saw any stolen property stored at Vernale's" (T. 715) (Appendix, pp. 18a, 19a).

With Respect to Questions Sought to be Reviewed, No. 3

c. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

21. In admitting the testimony of Wayne Bishop as set forth in paragraphs 263, 264, 265, 266, 267, 268, 271 and 272 of the finding" (Record, pp. 213, 219).

4. With Respect to Questions Sought to be Reviewed, No. 4:

a. Excerpt from State Supreme Court Record:

"248. Now, in this particular case, members of jury, you will recall, I am sure, that Mr. Paul Moynahan took the stand. Mr. Paul Moynahan testified.

"Now, under our law, an accused person is not obliged to take the witness stand in his own behalf nor is he obliged under our law to produce any witnesses in his own defense.

"On the other hand, he has a perfect right to do so, as this defendant has chosen to do. In weighing the testimony he has given you should apply the same principles by which the testimony of other witnesses is tested, and that necessarily involves a consideration of interest in the case.

"You will consider the importance to Mr. Moynahan of the outcome of the trial, and his motive on that account for not telling the truth. An accused person, having become a witness, stands before you just like any other witness, and is entitled to the same consideration and must have his testimony measured in the same way as any other witness, including, however, his interest in the verdict you are to render."

To this portion of the charge, the following exception was taken:

"Mr. Hennessey: Thank you, your Honor. My first exception would be to your Honor's charge in which you gave a charge to the jury with respect to the bias or interest of Paul Moynahan, the defendant, in testifying. I believe that this charge is one which has been recently recognized in the case of *State of Iowa* vs. *Bester*, 167 N.W.2d 705, a 1969 Iowa case, as being ground for reversible error in that, first, singling out the testimony of a defendant in a criminal charge to a certain extent is violative of his presumption of innocence.

With Respect to Questions Sought to be Reviewed, No. 4

The Court: Is that a United States Supreme Court decision?

Mr. Hennessey: No. It is an Iowa case.

The Court: I did not think the United States Supreme Court had gone that far as yet. It may, but I don't think it has done so up to this point. All right.

Mr. Hennessey: Well, in any event, I feel quite apart from the fact that I cite the *Hester* case which held for the proposition that such a charge is unfair in that it creates undue focus upon the testimony of the defendant and thereby casts again undue focus on his testimony, and singling it out in a criminal case, particularly where his testimony is significant is improper and ground for reversible error.

The Court: Well, until such time as this State's Supreme Court tells me it is wrong, I will do it.

Mr. Hennessey: I have just stated by exception.

Secondly, I think that charge likewise violates the presumption of innocence by its very nature. It says although a man is innocent and fault free, the suggestion is if he testifies you take into account the fact that he has done something he is trying to get out of.

The Court: Well, doesn't he expose himself to the trial? In other words, he exposes himself to its risks and he has to have his testimony measured in the same way. How is a juror to know what rule to apply, what guideline to apply to his testimony as opposed to that of any other witness? There has to be some standard; there has to be some guideline to a jury.

Mr. Hennessey: You may be right, your Honor. I am just taking my exception.

The Court: An exception may be noted" (Record, pp. 81-3).

With Respect to Questions Sought to be Reviewed, No. 4

b. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

7. In charging the jury as appears in paragraph 248 of the finding. Said charge was erroneous because it unfairly singled out the testimony of the defendant for adverse comment, because it was inconsistent with the presumption of innocence, and because it suggested that the defendant's testimony was entitled to less weight than that of any other witness merely because he was the defendant" (Record, pp. 213-4).

5. With Respect to Questions Sought to be Reviewed, No. 5:

a. Excerpt from State Supreme Court Record:

"MOTION FOR PRODUCTION AND INSPECTION

The defendant moves this Court, pursuant to C.G.S. Section 54-86A for the production, inspection and copying of the following items which are or may be material to the preparation of his defense:

* * * * *

3. All exculpatory information or material now in the State's possession or which may come into the State's possession which shall include but not be limited to:

A. Written or oral statements or notes which were otherwise recorded statements of one Charles Vernale made since the start of the investigation involving this case including but not limited to:

1) Statements made to the State Police or State's Attorney's office prior to his appearance before Judge O'Sullivan.

2) Recorded testimony before Judge O'Sullivan.

3) Statements made to the police in Somers.

4) Statements made to the State Police at the State Barracks in Hartford since June 1969.

* * * * *

C. Written or oral statements or notes which were otherwise recorded statements of one John Bishop made since the start of the investigation involving this case including but not limited to:

1) Statements made to the State Police or State's Attorney's office prior to his appearance before Judge O'Sullivan.

2) Recorded testimony before Judge O'Sullivan.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 5

7. Produce for inspection and copying all evidence including but not limited to that produced before the O'Sullivan Grand Jury (so-called) which is favorable to the accused and would tend to exculpate him of the crimes charged.

* * * * *

Defendant
By F. Owen Eagan
His Attorney

(Filed: Sept. 11, 1969.)

* * * * *

9/23/69 * * * * *

* * * * *

par. 3 granted as to exculpatory information.

* * * * *

Par. 7 granted as to exculpatory information.

(Barber, J.)"

(Record, pp. 10-13).

b. Excerpt from Defendant's Supreme Court Appendix:

"October 13, 1969

Francis M. McDonald, State's Attorney
7 Kendrick Avenue
Waterbury, Connecticut

Dear Frank:

* * * * *

I was sorry that the Judge saw fit to place the very heavy burden of examining all the material in the file to produce exculpatory evidence for us. In my original Motion for Disclosure I tried to spell out the evidence I thought was exculpatory, but I am sure there are other statements in the file which tend to vindicate our clients. It has always been my belief that negative statements are often in of

themselves exculpatory and I would ask that you examine your file with this in mind.

*** * * * ***

Sincerely,
Owen Eagan"

"STATE OF CONNECTICUT
NEW HAVEN COUNTY
OFFICE OF STATE'S ATTORNEY AT WATERBURY

October 29, 1969

Owen Eagan, Esquire
Attorney at Law
40 Russ Street
Hartford, Connecticut 06106

Dear Owen:

Thank you for your letter of October 13, 1969.

With respect to your observations concerning exculpatory material, we believe that the only relevant exculpatory material is the fact already known to you, that Charles Vernale at one point denied that he had given Paul Moynahan a color television set. I do not believe that negative statements are any more exculpatory than incriminating statements.

*** * * * ***

Francis M. McDonald
State's Attorney at Waterbury"

(Appendix, pp. 34a, 35a).

c. Excerpt from State Supreme Court Record:

"MOTION TO DISMISS

The defendant in the above entitled action hereby represents:

With Respect to Questions Sought to be Reviewed, No. 5

1. On or about September 25, 1969, the Honorable Court entertained argument on a Motion for Discovery.

2. On or about September 25, 1969, at the conclusion of the aforementioned argument, the Honorable William P. Barber ordered the State's Attorney to provide the defendant's counsel with all exculpatory information or material in the State's possession.

3. That the State's Attorney has not provided any exculpatory information to the defendant's counsel although said information is available to the State's Attorney in the form of transcripts and other recorded testimony.

WHEREFORE, the defendant hereby respectfully requests that the court dismiss all proceedings against him in the above entitled case.

Defendant
By F. OWEN EAGAN
His Attorney

(Filed: Nov. 1, 1969.)

ORDER

Nov. 25, 1969

Motion Denied.

By the Court (BARBER, J.)
FRANCIS J. BUTLER
Clerk"

(Record, pp. 13-4).

d. Excerpt from State Supreme Court Record:

"275. Immediately upon receipt and examination of the prior statements and testimony of Charles Vernale pursuant to the order of the court as set forth in Finding No. 274, the defendant made the following motions to dismiss and for a mistrial:

The Court: Now, Mr. Hennessey, do I understand you have a motion to address to the court?

With Respect to Questions Sought to be Reviewed, No. 5

Mr. Hennessey: Yes, your Honor.

It is my understanding, first of all, that the entire transcript of Mr. Vernale was going to be marked as an exhibit for identification and sealed, which, I believe, has not been done to date.

It was also my understanding or possibly it was a motion to be made that the entire testimony of Mr. Miller was going to be marked for identification and sealed, which, I believe, has not been done to date.

And I am not certain, either, whether all the statements of Mr. Bishop have actually been marked for identification. And all these are germane to our motion, which is a motion at this time to dismiss, your Honor.

The basis for that motion is, as I believe I informed the court on previous occasions, that on September 23rd — and I now have obtained a transcript of the proceedings of September 23rd, relative to the order of Judge Barber, with respect to the motion for production and inspection of August 29th, and I believe if your Honor reads the order of Judge Barber, you will find that Judge Barber ordered the State to produce all exculpatory information or material now in the State's possession, which shall include, but not be limited to, the then listed categories, a, b, c, d, e, f, g.

And all those were granted. H and I were denied.

Then, further, with respect to 7, I believe he also granted that motion insofar as it related to the exculpatory testimony which was obtained through the Grand Jury proceedings.

* * * * *

And further, that these were mere specifications of types of exculpatory evidence sought, and that the order was not in any sense limited merely to those, but rather, that Judge Barber, as I read the transcript of his order of September

With Respect to Questions Sought to be Reviewed, No. 5

23rd, and as I checked the docket after inquiry in the clerk's office with respect to the granting of that motion, it appears clear to me that Judge Barber did in fact order the production of all exculpatory testimony in the possession of the State's Attorney.

On October 13, 1969, Attorney F. Owen Eagan of Hartford, * * * wrote to Mr. Frank McDonald, asking him to give all exculpatory evidence for the purpose of complying with the order, pursuant to § 54-86a, which order was granted on September 23rd, and I have a memorandum of law, and I have attached as an exhibit a copy of that letter.

On October 29th, Attorney Frank McDonald responded:

'With respect to your observations concerning exculpatory material, we believe that the only relevant exculpatory material is the fact already known to you, that Charles Vernale at one point denied that he had given Paul Moynahan a color television set. I do not believe that negative statements are any more exculpatory than incriminating statements.'

I have attached a copy of that letter as Exhibit B.

On the same day that letter was written, Attorney Eagan, on behalf of Paul Moynahan, made a motion to dismiss. The motion to dismiss is on file dated October 29th.

At the conclusion, the Honorable Court entertained arguments on the motion for disclosure, and at the conclusion of the aforementioned arguments, the Honorable William P. Barber ordered the State's Attorney to provide the defendant's counsel with all exculpatory information or material in the State's possession.

The State's Attorney has not provided any exculpatory information to the defendant's counsel, although said information is available to the State in the form of transcripts and other recorded testimony.

With Respect to Questions Sought to be Reviewed, No. 5

On November 25th, I argued before Judge Barber this motion to dismiss which was denied (Record, pp. 137-140).

In the course of that, I stated in Court — and I have a transcript, so that there will be no feeling that I am taking things out of context. I asked Mr. Haffner to also obtain for me a transcript of that proceeding, and they have it, and as I understand it, it is in its entirety, as evidenced in the stenographer's notes (Record, p. 40).

And this was the court: 'You can't search the State's Attorney's file. If there is anything in particular that you point to, I will examine it, but if you're asking for a blanket search of the State's Attorney's file, you are going to be denied.

'I assume the State's Attorney has turned over to you everything that is reasonably exculpatory.'

I then asked to be heard:

'If I might be heard on that?'

And then the court said:

'In the absence of any showing that he hasn't, that would suffice. You can prove later on that he hasn't. Of course, that is available to you.'

And I said: 'Might I at least be permitted to make my point with respect to this information?'

And I said, 'It is my understanding, and again I stand corrected if I am wrong, that we have received no exculpatory information of any kind. It is our claim that there are statements in the possession of the State's Attorney, which include statements tending to indicate that our client was not involved in this crime, statements of persons who are charged as co-conspirators, who deny any knowledge of our defendant. Statements of persons who are claimed to have knowledge of receipt of stolen goods wherein they deny that

With Respect to Questions Sought to be Reviewed, No. 5

they have such knowledge. Prior contradictory statements. And if I might be permitted, I would cite your Honor the case of *Napue* vs. *Illinois*, 360 U.S. 264, which held that exculpatory evidence which was evidence which would affect the witness' credibility, could not be denied to a defendant.'

I then said, '*Brady* vs. *Maryland*, and *Giles* vs. *Maryland* discuss in some length the requirement that the State has a duty to disclose exculpatory evidence, whether or not asked for.'

The answer replied to that by the Court: 'Those are basic.'

And then I said, 'And the position which we are trying to make, obviously we aren't asking to go through their files. We know your Honor never ruled on that. The only alternative is, if your Honor would go through the file, because frankly, how else are we to know? We have reasonable cause to believe that such statements exist.'

And then the court said, 'I don't think we have come to the point yet where a court has to go through the entire file of the State's Attorney in every case.

'First of all, there is an order from the court that he turn over any exculpatory matter. If you can point to any specific thing, then I will examine it and see if it reasonably is exculpatory.'

Then I said, 'Well, we would make the claim that any statements in the State's Attorney's file, if he has them, that indicate a lack of knowledge of the involvement of Mr. Moynahan, would be constituted exculpatory evidence. Any named co-conspirator's statement would be constituted exculpatory evidence. Or any statements in the file which are inconsistent with other statements in the file, where a witness or a party has given a statement on one occasion, and has given a contradictory statement denying the prior statement on another occasion, we would consider those to be exculpatory.'

With Respect to Questions Sought to be Reviewed, No. 5

At which point Mr. McDonald said, 'We wrote to Mr. Eagan on October 29th, advising that Charles Vernale at one point denied he had ever given Paul Moynahan a color television set, stating that was, in our belief, the only relevant exculpatory material we are aware of in our file.'

I then said, 'But it also states: "I do not believe that negative statements are any more exculpatory than incriminating statements."' So this is where Mr. Egan and Mr. McDonald joined issue on the law.

Mr. Vernale, I believe, testified before the Grand Jury. We were not given a copy of that, yet there is an indication that Mr. Vernale has given contradictory statements.

The Court: The motion to dismiss is denied.

Mr. Hennessey. Exception.

Since the time that this trial commenced, your Honor, I would submit that we have been given what I would call legally exculpatory evidence which, in each instance, was only given pursuant to the exercise of your Honor's power over the objection of the State.

In the testimony of Mr. Bishop alone, let's consider what was exculpatory in that.

The State put Mr. Bishop on as their witness. The State put Mr. Bishop on to testify as to a transaction in April involving a certain identified Motorola set. Yet, the State had in its possession, and failed to turn over, testimony which was inconsistent, I would submit, as to date, as to time, as to place, as to manner, and as to description, as to what that set was that was put in there, when it was put in there, where it came from.

None of these matters were ever turned over to us, your Honor, except through your Honor's office, and after we had to make a motion when Mr. Bishop had already testified.

With Respect to Questions Sought to be Reviewed, No. 5

Mr. Miller took the stand, Mr. Miller testified finally on cross-examination about obtaining two sets from Mr. Vernale. The State had in its possession testimony inconsistent with that, testimony indicating that more than two sets were involved in Mr. Miller's transactions.

Further, the State had in its possession two statements wherein I would submit, and they have now been marked into evidence, Mr. Miller indicated a lack of recall, a lack of ability to describe the set. He indicated inconsistencies as to how he arrived at the home. He indicated inconsistencies as to when he met Paul Moynahan. On one occasion he said he had met him before. On another occasion he said he never met him until after.

All these inconsistencies are there, and all these inconsistencies and contradictory statements which go to the direct issue of credibility of that witness, were only made available to us through your Honor's office.

Further, there are still other statements that Mr. Miller has made which we have not been given an opportunity to see. Of course, that we had excepted to on other grounds, but we do submit the entire transaction between Mr. Miller and Mr. Vernale would be germane to any cross-examination of Mr. Miller for a number of reasons, not the least of which would be his ability to identify and recall this particular set as he has testified to in court.

And then, finally, your Honor, again over much objection from the State, we were then given an opportunity finally to see portions of Mr. Vernale's statements and this is what brought this to a head in my mind, having finally, on Saturday morning, being given the statements, examining them, and finding it replete with inconsistencies, replete with inconsistencies not only with respect to Mr. Vernale's own statements on various occasions, but clearly inconsistent with Mr. Miller's testimony, and clearly inconsistent with Mr. Bishop's testimony.

With Respect to Questions Sought to be Reviewed, No. 5

And I would submit to your Honor, for example, in the statement on one occasion Mr. Vernale did say he gave Paul Moynahan a color television set or he didn't but he also said he did, and he also said it was a 25-inch set, and he also said it was delivered late in the summer, and he also said John Bishop never was with him.

That was all in that first statement when he did implicate Paul Moynahan.

Then he testified, under oath, in front of the Grand Jury, and he said he lied, and he testified to why he said he lied, because he said that the State Police had come up to him and caused him to lie, and he gave Judge O'Sullivan his reasons why he said he was inconsistent.

Further, he testified on all the occasions wherein he was asked whether he did or he didn't, in each instance when he testified, he testified as far as he knew, Paul Moynahan had no knowledge of what he was doing.

The Court: You are talking about Vernale now?

Mr. Hennessey: I am talking about Vernale now, and that Paul Moynahan had no knowledge that Vernale was involving hmself in the stolen stuff.

Further, he said he only had very limited dealings with John Bishop on only three or four occasions.

Further, he indicated on one occasion he never even first came into contact with Bishop until late in the summer of 1967, and possibly 1968:

The Court: Don't you have a right to cross-examine Mr. Vernale on these issues, if you so desire?

It seems to me, assuming that there was a delay in getting this information to you, and assuming what you say is correct, I don't see how a motion to dismiss—to grant a motion to dismiss at this time would be justified, in view of the fact that the information is available to you. You have

been given this information. You have a right to cross-examine Mr. Vernale to your heart's content, within limitations set by the Court (Record, pp. 140-5).

Mr. Hennessey: Let me suggest this to you, your Honor: If I might draw an analogy with a civil case, since certainly under civil law in this State we do have rights of discovery that are recognized.

Let's assume a man got on the stand and started testifying as to an injury which was not previously disclosed pursuant to an order for disclosure. Would there be any question in the mind of any Court: That would be totally improper. The reason for the discovery is to give counsel an opportunity to prepare their case, and to prepare their defense (Record, p. 41).

Mr. Hennessey: Now, here we come on a Saturday when Mr. Bishop has long been off the stand, for example, yet now we find the State had a lot of information totally inconsistent with what Mr. Bishop said. How does one reasonably prepare a case for defense consistent with Rule 54-86A, which gives the right of discovery for the purpose of preparing a case, for defense, when the State just merely refuses to comply with it, or merely says that they have complied, even though to me it is crystal clear on examination of these documents that they did not, that they never complied with this rule or this ruling of the court.

Now, this isn't, we are not just talking about the obligation to produce evidence at trial, we are also talking about a statute of the State of Connecticut which was passed for the purpose of giving an attorney defending a person charged with a crime an opportunity to see and examine information which would be of assistance to him in the preparation of a defense.

Now, that was the order that Judge Barber granted, and he granted it many, many, many months ago. Yet, here we are, I submit, flying blind. We take the witnesses one at

a time, in the order that the State puts them on, and then when we—when they have been testifying, when the State, having exhausted all its objections to even still giving us this information, they then come forward and furnish it to us (Record, pp. 145-6).

We then have an opportunity to cross-examine one witness with respect to what he said. But, I would submit to you, your Honor, for example, let's take John Bishop, and let's say we were diligent counsel, and I submit we have been in this case, and certainly if I had not been, I would submit on behalf of Attorney Owen Eagan, in the preparation of their case, that he was a diligent attorney. He was a former United States Attorney. He is a man of high repute. He knows how to prepare a case, and he worked hard on this one (Record, pp. 41-2).

Now, let's say we had John Bishop's testimony, and I would submit to you I would ask your Honor to put your Honor in the place of a defense attorney in this case, what might you have done?

It might have been interesting to try to track down dates and times to check out the Sheffler store, to try to develop a line where we could show certain inconsistencies.

Further, had we had Mr. Vernale's testimony, we could have looked at it in the context of Mr. Bishop's. Where Mr. Vernale says one thing, I know John Bishop never delivered that set with him, another thing I know, that set never sat in my garage for three or four weeks, because it was turned over within two days, and this is even when, on April 3rd, he is testifying that he did give a set to Mr. Moynahan.

Further, still, I would ask your Honor to read the statement of April 3rd, and consider it in the context of the facts that this testimony was given as a result of the conversation with Mr. Secor. I have no knowledge of what Mr. Secor and Mr. Vernale did on April 2nd. I do know, however,

that on April 3rd Mr. Vernale came before Judge O'Sullivan and in effect admitted he perjured himself on April 1st. And it is perfectly obvious to me what was done there to cause him to come—to become so violently changed in his testimony, and I think it shows in the transcript, if your Honor will examine it.

With respect to Mr. Miller, the only information we have about Mr. Miller was the information we went out and hired people ourselves to go out and try to see Mr. Miller, and try and check him out at our own expense. We had to go out and try and find out what Mr. Miller was going to say.

Yet, even so, we were never made aware that Mr. Miller's recall was so poor or so questionable, that he said, when asked by the police, that he couldn't remember the make or the model or the year, 'I think it was a Motorola, but I can't remember what kind.'

We never had this information available to us. We never were made aware, for example, that Mr. Miller denied selling some sets and admitted selling others to the State. I don't even know how many he admitted, because in the questions from the State to Mr. Vernale, there is a question, there is, I believe, a question from someone, either Wayne Bishop, or Mr. Secor, saying that he admitted on, I think, three or four occasions.

I don't know what words were used, so I assume there even may be more.

I would submit, your Honor, that certainly the State has not at this point exhausted its disclosure of exculpatory information. I submit that they never even made an honest effort to start; that to call Frank McDonald's letter of October 29th compliance with that order under Section 54-86A, I submit it is really, it is so inconceivable, . . . (Record, pp. 146-7).

With Respect to Questions Sought to be Reviewed, No. 5

. . . and I would like to point out, your Honor, I have a memorandum of law on this, and I would like to point out some law with respect to this.

And I feel very strongly about this.

My first paragraph reads:

'The duty of a prosecutor is to present all evidence at a criminal trial whether it be favorable or unfavorable to the State's case,' citing *State* vs. *Guilfoyle.*

'The State's Attorney is not a party to the case, but rather a servant of the law with the twofold aim that guilt shall not escape or innocence suffer.' That is *Singer* vs. *United States,* 380 U.S. 24.

'The prosecution has an affirmative duty to produce all exculpatory evidence in its possession where such evidence is material, either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.'

That is *Brady* vs. *Maryland.*

'A prosecution'—and this is a quote—'A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him, helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile.'

'When there is any doubt as to what evidence must be disclosed, which might be admissible and be useful to the defense, the prosecution is not to decide for the Court what is admissible or for the defense what is useful.'

Barber vs. *Warden,* 331 F.2d It is a 1964 case.

'The duty of the prosecution, which includes investigating officers, as well as attorneys, is an affirmative duty to make prompt disclosure of any information known to it

With Respect to Questions Sought to be Reviewed, No. 1

which might have material bearing on the truthfulness of any evidence adverse to the accused.'

That is *Estes* vs. *United States*, and I have the citation.

'The State is accountable for all evidence which comes within the knowledge of its agents, so that knowledge of the police is chargeable to the prosecutor.'

That is *Evans* vs. *Koop*. That is also a Federal case.

'Where the non-disclosure is deliberate either in the sense of a deliberate decision to suppress for purpose of obstructing, or a failure to disclose evidence whose high value to defense could not escape prosecutor's attention, such disclosure is compelled, and the failure to make will be deemed to be clearly prejudicial.'

That is *United States* vs. *Keogh*. That is a Second Circuit case.

'The time for such disclosure must be when the disclosure would be of value.'

'The failure to disclose evidence which might cause the jury to have a reasonable doubt as to the guilt of an accused, is constitutionally unpermissible.'

That is *Levin* vs. *Clark*.

'Exculpatory evidence takes many forms. It includes evidence contradictory to other evidence.'

That is *Miller* vs. *Pate*, 386 U. S. 1.

'Clearly evidence affecting the credibility of State's witnesses is included in this category.'

That is *Giles* vs. *Maryland*, a United States Supreme Court case, and *Napue* vs. *Illinois*, a United States Supreme Court case, the same cases that I cited back on November 25th, your Honor.

With Respect to Questions Sought to be Reviewed, No. 5

'Section 54-56 permits a court at any time on motion of defendant to dismiss an information where, in its opinion, there is not enough evidence to justify the bringing or continuing of it, or of placing the accused on trial.'

Section 54-86A permits a pre-trial motion to produce exculpatory information or material for copying to be used in the preparation of the defense.

'In this case such a motion was granted on September 23rd. October 13th, a further request was made. On October 29th, the State's reply, and then the motion on November 25th.

'At trial over the State's objection, the Court ordered disclosure of several statements of witnesses, which statements it is submitted are replete with contradictory material as to various testimony as well as exculpatory material. For example, the State knew that its case rested on a claim that a 22-inch Motorola console, early American maple set, was stolen from Martin's Appliance in North Haven on April 8, 1967. Nonetheless, they failed to disclose paragraph one, that John Bishop, a proposed witness, testified on more than one occasion that the set was of another make, and was stolen from another store in another town at a different time.

'Paragraph two, that Edward Miller, a proposed witness, testified on two occasions as to his inability to recall the set by description.

'Paragraph three, that John Bishop had admitted numerous other robberies.

'Paragraph four, that Charles Vernale's statement denying giving Moynahan a set detailed reasons why he gave a prior inconsistent statement.

'Paragraph five, that Mr. Vernale stated that the set was delivered within two days of the robbery, which is inconsistent with Mr. Bishop's testimony.

With Respect to Questions Sought to be Reviewed, No. 5

'Seven, that Mr. Vernale always stated that Moynahan had no knowledge of his activities.

'Eight, that Mr. Vernale always stated that the TV was a gift, given out of friendship.

'Nine, that when Mr. Vernale first admitted giving Moynahan a set, he misdescribed it.

'Ten, that Mr. Vernale denied ever selling Mr. Miller any sets.

'Eleven, that the State had statements from Mr. Miller in which he admitted selling more than two sets received from Mr. Vernale.

'Twelve, that Mr. Miller's Mr. Bishop's and Mr. Vernale's statements all contained inconsistencies as to dates, places, events, and recollection which would have direct bearing on their own testimony, and on that of each other.

'Based on these examples alone, it seems that the State has failed to comply with the order of this Court. Further, it appears that an *in camera* inspection of its file should be conducted by the Court to determine whether other exculpatory information or material has been withheld.'

I submit, your Honor, that there comes a point when we must consider the rights of the accused as to how much longer the State is going to be permitted to prosecute.

In this instance there is no question that the State has been engaged in exhaustive investigation, and that during all this period of time, Mr. Moynahan was under charges.

And there can be no question that from the time we entered this case, we asked and insisted that the case go forward promptly and expeditiously; that there were at least four or five delays over the commencement of the trial, at the request of the State; that it was not until after Christ-

With Respect to Questions Sought to be Reviewed, No. 5

mas that the State, all of a sudden filed a substituted information, and they dropped the conspiracy charge, and nolled it.

And, nonetheless, informed Mr. Moynahan to go on trial for receiving stolen goods, or receiving a stolen television set.

This man now is in a situation where he has been out of work since, I believe at least May of 1969, without pay, and that he will continue to be out of work without pay until the ultimate resolution of this matter.

Possibly he will be out without pay forever.

We have made every effort, we submit, to defend him in the best manner possible, and we feel now, as this trial develops, that it becomes crystal clear to us that we were denied various testimony of an exculpatory nature, which the Court had ordered way, way back before this case ever started; that it has seriously affected our ability to put on a proper and adequate defense; but there is no way that you can rectify this dereliction on the part of the State.

Their failure to turn over matters which the Court ordered merely by saying, 'Well, you have got them, Mr. Hennessey, finally.'

We get the statements of Mr. Vernale on Saturday, although his name has been mentioned throughout the trial and that the jury, I am sure, has all sorts of pictures of Mr. Vernale in their mind. And on Saturday morning we are given these statements and there is not one line, from the letter of Mr. McDonald, and there are really hundreds of pages of testimony.

Now, I cannot conceive of how the State can say they did comply with that order, or how they cannot concede that we have been seriously prejudiced in their refusal to comply with that order.

With Respect to Questions Sought to be Reviewed, No. 5

We were never given the opportunity to prepare this case as we should have been permitted to, because of the Court's ruling, and it is for that reason we are now in a situation where we have been on trial for many, many weeks. I submit we are going into our third week of trial here, and it is not a simple trial, but a very complicated trial, there is no question. I would hope your Honor would agree with me that it is quite a complicated trial, and there have been difficult rulings that have arisen, and if your Honor would again place yourself in my position, I am sure you would realize how difficult it has been to try to adequately prepare a case from the outset, wherein we could develop a line of defense which was consistent and logical with the information that we had a right to have, when in point of fact, we were never given that information.

I cannot conceive that if this were a civil case, and these gentlemen are representing a plaintiff and it was merely just an order to produce medical testimony, and all of a sudden they came in with a doctor whose report they were never given, who gave this man a 15% disability of the back, although on any prior occasion there had been no disability rendered, that the Court would not be incensed immediately, because these type of situations I am sure your Honor in his experience is aware of the reason for disclosure, and the purpose of disclosure, for the preparation of a defense, that where such things come in at the eleventh hour, they cannot be permitted.

I just feel, your Honor, that you should examine, certainly, Mr. Vernale's testimony that we were given, and all the testimony in his file, and I cannot feel that you can escape the conclusion that had you been the lawyer, and were you standing where I am now, that you would not feel that there have been no compliance, and had there been compliance promptly, and in accordance with the order, we would have been given an opportunity to prepare our defense.

With Respect to Questions Sought to be Reviewed, No. 5

The Court: All right (Record, pp. 42-8).

* * * * *

The Court: Gentlemen, it serves no purpose at this time to prolong this matter any further. The court is of the opinion that, and I presume the State's Attorney's office has done its duty.

I cannot assume the impossible burden of going through all these items and all these exhibits, all the transcripts of all the testimony that has been taken. They will be marked for identification. If there should be a need for an appeal to a higher court, and the higher court feels that there has been a miscarriage of justice in this case, I am sure that the Supreme Court of our State will rectify any such error on the part of this court.

* * * * *

On the presumption that the State's Attorney has done its duty in turning over any material which is of an exculpatory nature, I am going to deny your motion, Mr. Hennessey, and an exception may be noted.

The exhibits will be marked for identification and they will be available for review in the Supreme Court, if necessary.

The Court: Motion for a mistrial is denied.

Mr. Hennessey: Exception.

The Court: Exception may be noted" (Record, pp. 148-9).

e. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF JOHN BISHOP

* * * * *

CROSS-EXAMINATION

* * * * *

" * * * He said in his signed statement that when he

returned to Vernale's for his money he helped Vernale load an RCA uncrated floor model color console into his station wagon (T. 171). He further stated that he didn't recall whether he brought the set to the front or the rear of the Moynahan house (T. 176, 177). He stated that possibly the RCA set was one of two RCA sets taken from H. P. Sheffler, Inc. of Deep River in the middle of the summer of 1967 (T. 180). * * *

* * * * *

In March of 1969 he testified under oath before the Grand Jury (T. 137). He testified that he stole some TV sets from Sheffler's in Deep River (T. 188). He testified that they were worth about $1000 to him when he took them to Vernale's (T. 188). He stated that he came back the next day and that Vernale asked him to deliver a TV set (T. 190). He testified that he thought it was a Zenith or an RCA (T. 190). * * *

* * * * *

He testified before the Grand Jury that the first time he met Paul Moynahan was at Vernale's house in June of 1967 (T. 207). * * * " (Appendix, p. 8a).

f. Excerpt from Defendant's State Supreme Court Appendix:

"TESTIMONY OF EDWARD MILLER

* * * * *

CROSS-EXAMINATION

* * * * *

"In his statement to the police on February 17, 1969 he told them he made a repair at the Moynahan home about a year ago (T. 512). * * *

This transcript was recorded on tape and a typed copy was shown to him (T. 513). No corrections were made to

it by him (T. 513). He further stated that it was a 23" set but that he couldn't tell the model or anything (T. 513). When questioned further in that statement he said it was a console model but that he couldn't tell the name or the serial number of the model itself because he didn't look at it (T. 514). * * *

On February 18 he was asked by the police if he had a chance to think over his statement of the prior day and to remember what make the set was * * *. He then stated that he couldn't remember what make it was as it was almost 2 years ago (T. 519). * * *

He then said that whatever work he did, he couldn't recognize the set (T. 520). * * *

The interviews on both the 17th and 18th were conducted by 3 policemen and each took an hour and a quarter (T. 520). The entire interviews were on tape (T. 520). * * *

He was also asked on February 18 if he remembered what make set it was and he said no because he was concerned about the trouble and not the make of the set (T. 527). He further told the police February 21 that he sold a set obtained from Vernale to a Mrs. MacIntosh in Wolcott (T. 530, 531, 536). He admits that that statement was false (T. 530, 531, 536).

On February 21 he told the police that he had no thoughts about the Moynahan set except what he told them on the prior occasions (T. 537). He testified before the Grand Jury that he met Paul Moynahan once at Vernale's 3 or 4 weeks before he did the repair work (T. 572). In his statement of February 17 he stated that he had never met Paul Moynahan before he did the repair work (T. 573). He stated on February 17 that he met Moynahan once at Vernale's after he did the repair work (T. 574). * * * " (Appendix, pp. 14a-16a).

With Respect to Questions Sought to be Reviewed, No. 5

g. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

4. In denying the defendant's Motion to Dismiss for failure to comply with the Court's order of September 23, 1969, which motion was dated October 29, 1969.

* * * * *

24. In denying the defendant's motions to dismiss and for a mistrial as set forth in paragraph 275 of the finding (Record, pp. 213, 219).

6. With Respect to Questions Sought to be Reviewed, No. 6:

a. Excerpt from State Supreme Court Record:

"260. The State introduced as its witness, Edward Miller.

* * * * *

On cross-examination Miller testified that he had given statements to the State Police on February 17, 18 and 21 of 1969 and had also testified before the Grand Jury.

Thereafter the following occurred:

Mr. Hennessey: I would move at this time, your Honor, for copies of any statements in the State's possession with respect to previous statements of Mr. Miller, and also a copy of the transcript of the proceedings in front of the Grand Jury, insofar as it relates to Mr. Miller's testimony.

Mr. Gaffney: If the court pleases, I think the court is aware of our interpretation of Public Act 680, your Honor.

The Court: Well, the jury may be excused.

Thereafter the court ruled in chambers that it would not make an in camera inspection of Miller's testimony, but would require the State's Attorney to do so, and would require the State to turn over any matter which might be of assistance to the accused. The defendant excepted to this procedure and requested that all transcripts of Miller's prior testimony and statements be sealed for review by the Supreme Court, which order was entered after verdict" (Record, pp. 101-2).

b. Excerpt from State Supreme Court Record:

"274. . . .

The State offered as its witness Charles Vernale who, after stating that he had been in State's Prison for 13 months, invoked the Fifth Amendment on three occasions,

the last being when asked if he had given Moynahan a color TV. Vernale had testified previously that he was a friend of Moynahan but also pleaded the Fifth when asked about his relationship with Moynahan. He also took the Fifth when asked if he had ever given Moynahan information with relation to criminal activities of any kind.

Thereafter at the commencement of cross-examination of Vernale, the following occurred:

Mr. Secor: Under the circumstances, we have nothing further of this witness. . . .

Mr. Hennessey: I would ask your Honor first that the State produce all statements in their possession, any signed statements, any copies of any written transcripts given by Mr. Vernale to any official to the State of Connecticut pursuant to Public Act 680, and also under the rule of Judge Barber.

The Court: Mr. Gaffney, do you have any statements relating to the testimony of Mr. Vernale?

Mr. Secor: Well, the State objects to this.

The Court: The objection is overruled.

Mr. Secor: Your Honor, it is going to take a considerable amount of time to segregate out the information that the defense is entitled to under your ruling.

Mr. Hennessey: Excuse me. So my motion will be clear, I have asked for all statements.

The Court: Yes, at this time, Mr. Secor, I am going to order the State to produce all statements.

Mr. Secor: For your Honor's inspection?

The Court: For my inspection. You say it will take some time, Mr. Secor?

With Respect to Questions Sought to be Reviewed, No. 6

Mr. Secor: Well, this is one, and there are more to come.

* * * * *

The Court: Now, gentlemen, the Court at this time will order the State to turn over to Mr. Hennessey, any and all statements made by Mr. Vernale with respect to the subject matter in question, whether they are statements made to the police department or to Justice O'Sullivan in conducting his investigation.

Is there any objection?

Mr. Secor: Now, your Honor, I really don't understand that order, and I don't think I could honestly and in good conscience properly comply with it to your satisfaction.

You said to turn over all statements of Vernale in reference to the matter in question.

Now, you must remember, Vernale has testified a great deal concerning this defendant, and a great deal concerning a lot of other people in the City of Waterbury.

The Court: Then I am going to put the burden on you as the representative of the State, to turn over all matters pertaining to this particular case.

Mr. Secor: Pertaining to matters concerning the defendant, Paul Moynahan?

The Court: That is correct.

Mr. Hennessey: I will take exception to that ruling, your Honor, and renew my motion that I have asked that all statements be turned over pursuant to Public Act 680, all statements given by this witness, and I claim that I either have the right to that under Public Act 680 or, in the alternative, I have the right to have an examination made of those either in camera by the Court, or, I think, more logically, by myself, that is my job to determine upon

the examination of all records any matter which would be pertinent to my cause.

The Court: I am going to include in that order any statements made by Mr. Vernale of an exculpatory or inculpatory nature, insofar as Mr. Paul Moynahan is concerned, or anything which may be of assistance to Mr. Moynahan, or anything which may be of assistance to Mr. Moynahan in defense of this case.

Mr. Hennessey: For example, he may have made numerous statements with respect to witnesses that have previously been here in Court, which matters will be of assistance to us. He may have made statements inconsistent with other testimony.

The Court: I am referring, gentlemen, specifically to *the Giles* vs. *United States* case. I cannot think of the citation now.

Mr. Hennessey: I have it, if you would like it.

The Court: I think the State ought to comply with the ruling in the *Giles case,* particularly with the majority view.

Do you have it, Mr. Gaffney?

Mr. Gaffney: I will have it shortly.

Mr. Secor: I would like at this time to object, and to take an exception to the Court's ruling. Public Act 680 does not require the broad order your Honor has issued, in view of the testimony that this witness, Vernale, has given on the stand, and as I understand it, the Court is not taking the written documents, Vernale's statements, and examining them himself for contradictions, but is strictly ordering the State to just turn it over wholesale to the defense.

With Respect to Questions Sought to be Reviewed, No. 6

The Court: I feel that anything that Mr. Vernale has said which might be of substantial assistance to the defense in this case should be turned over. In other words, it is broader, the ruling that I am making under the *Giles* case, it is broader than the statute provides for in the State of Connecticut.

But, nevertheless, it is my feeling that we are bound by the United States Supreme Court's decisions, and even though they go beyond Rule 680 in this particular case, I am going to do it.

Mr. Secor: We object and except to it with this aside, now, your Honor: The State's Attorney's office is the one that is to make this determination. Is that your Honor's order?

The Court: Well, I will make it this broad so there will be no question about it.

All statements made by Mr. Vernale are to be turned over to Mr. Hennessey.

Mr. Secor: Now, is that a new order?

The Court: Yes.

Mr. Secor: That is, statements regarding other people?

The Court: Everything.

Mr. Secor: Anything that the State has that Mr. Vernale has ever given the State Police or Justice O'Sullivan?

The Court: Yes. If I am incorrect, let the Supreme Court rule on it.

Mr. Secor: Now, I think I should apprise the court that it is within the realm of possibility, maybe probability, the court is not quite aware of what the effects of this last complete broadside order is.

* * * * *

With Respect to Questions Sought to be Reviewed, No. 6

I think it is grossly improper, your Honor, and I am sure you were not conscious of that when you issued that order.

The Court: Just so there will be no misunderstanding, I am going to get the *Giles* case and read from that case, and this will be the order of the court.

Under the ruling in the *Giles* case as expressed by Justice Fortas, ordering the State to disclose evidence in its exclusive possession, which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial.

That is the order of the court.

Mr. Hennessey: I at one time thought that your Honor was going to give us the entire statement.

The Court: Well, I have changed it.

Mr. Hennessey: I just wanted to make sure.

The Court: And the reason I changed that is that it was brought to my attention by Mr. Secor that I was not conscious of the fact that there may be other cases involved here not related to Mr. Paul Moynahan, which might be affected by the order of the court. And this is the reason why I modified it, limited my order in this respect.

Mr. Hennessey: Well, I wish to be heard only as to the point whether or not such testimony may have any bearing on any other case.

I would submit that the State has, through its own witnesses, sought to introduce evidence which would place in this jury's mind the existence of numerous cases through Mr. Bishop. They have also, I believe, through placing Mr. Miller on the stand, brought into the issue the question of several other cases, and finally, by placing Captain Bishop on the stand, they have brought into issue certainly the Moynahan case, the air conditioner.

With Respect to Questions Sought to be Reviewed, No. 6

I think, as I understand the law, absent of showing an articulated showing which your Honor would make, your Honor would rule that certain matters would involve security or danger to individuals, that is the situation where your Honor might exercise a ruling by virtue of an examination which your Honor makes, and then those matters could be sealed and could be made subject to subsequent review by the court.

But since this man has been placed on the stand and since all this evidence has come in previously, I would submit that that evidence is germane to the issues that have been raised by this trial, and that therefore, it should be my right to examine, and my right as an advocate to make the determination as to what evidence in these statements may be of assistance to me in the defense of my case on behalf of my client.

The Court: Let me repeat my order, gentlemen:

The order of this court is that the State is ordered and required to disclose to Mr. Hennessey evidence in its exclusive possession which is not merely cumulative or embellishing and which may be of material importance to the defense, regardless of whether it relates to testimony given at the trial.

That is my order, gentlemen.

* * * * *

Mr. Hennessey: And I object and except * * * (Record, pp. 131-7).

The Court: The State, and for the protection of Mr. Hennessey's rights, the entire record will be marked as an exhibit for identification in the event that future need of it is required * * * (Record, pp. 40-1).

With Respect to Questions Sought to be Reviewed, No. 6

After the verdict all prior statements and testimony of Vernale were sealed by the court and made a part of the record" (Record, p. 137).

c. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

17. In refusing to grant the defendant's motion for production and inspection of prior statements of State's witnesses Edward Miller and Charles Vernale as stated in paragraphs 260, 261 and 274 of the finding" (Record, pp. 213, 218).

• • • • •

7. With Respect to Questions Sought to be Reviewed, No. 7:

a. Excerpt from State Supreme Court Record:

"MOTION TO QUASH INFORMATION

The defendant respectfully moves the Court for an order quashing the information as to Counts One and Two herein and sets forth, in support thereof, the following reasons:

1. The defendant by information is charged with violations of Sections 54-197 and 53-63 of the Connecticut General Statutes, as amended.

2. In substance the defendant is charged with larceny and conspiracy.

3. The proceedings above were authorized pursuant to Section 54-47 of the Connecticut General Statutes, Revision of 1958, as amended.

4. Said statute creates and limits the authority of any and all persons designated thereunder.

5. Said statute makes no provision for the presence of any persons or officers other than witnesses, judge, referee, state's attorney, other attorneys empowered by the court to examine witnesses, the official stenographer of the court or his assistant.

6. Being a statutory creation the provision in question is limited by its terms and, by rule of construction, the "inclusion of one is the exclusion of others."

7. On May 6, 1969, there was in attendance at said hearing, one Wayne Bishop, a State Police Officer.

8. The attendance of said Police Officer at said hearing was, by clear implication, in violation of the provisions of the statute empowering the grand jury.

9. While in attendance as aforesaid, said police officer exploited the opportunity of overhearing testimony by

With Respect to Questions Sought to be Reviewed, No. 7

noting the evidence of all witnesses, extracting portions therefrom, and filing an affidavit with the State's Attorney upon the basis of which a warrant in the instant case was issued.

The said Bishop further participated illegally in said hearings as he acted as an attorney propounding questions to the witnesses.

10. In so doing he gained clear access to material and evidence which Section 54-47 posits in the exclusive control, custody, and use of the Superior Court *and no others* (emphasis added).

11. In so doing his conduct operated to the sole advantage of the police authorities and to the pronounced prejudice of the defendants.

12. Hence the statute operated to discriminate against the defendant and in favor of the arresting police authorities when in fact and in law no such inequality was contemplated or intended by the Legislature.

WHEREFORE, the defendant moves that all proceedings emanating or flowing from the aforementioned violation of the terms of Section 54-47 be declared null and void and:

A. The affidavit offered in support of the issuance of the Bench Warrant in the instant case be stricken from the record.

B. The information based thereon be quashed and the charges dismissed as to this defendant, as the same are illegal and based upon proceedings violative of the Due Process guaranty of the 14th Amendment to the United States Constitution.

Defendant

By F. OWEN EAGAN
His Attorney

(Filed: Sept. 11, 1969.)

9/23/70 Denied, (Barber, J.)" (Record, pp. 2-4).

With Respect to Questions Sought to be Reviewed, No. 7

b. Excerpt from State Supreme Court Record:

"MOTION TO DISMISS

* * * * *

PART B.

1. This prosecution resulted from an inquiry by a State Referee held pursuant to § 54-47 (Conn. Gen. Stat., 1958 Rev.) by order of this Court, dated March 11, 1969.

2. As a result of the § 54-47 inquiry by the State Referee conducted between March 18, 1969, and June 12, 1969, (a) defendant, with others, was the subject of a public report classifying him as a criminal, without affording trial or procedural safeguards, (b) defendant was a witness against himself without being fully warned of his constitutional rights, (c) defendant was the subject of a report which consciously generated publicity in the community in which he resided, and (d) defendant was the subject of a report resulting from hearings at which other than the State's Attorney and the State Referee were present.

3. Prosecution resulting from the inquiry under these circumstances:

(a) resulted from operation of § 54-47, which is unconstitutional on its face and as applied in that it deprives defendant of his right to confront and cross-examine the witnesses against him, his right to present evidence on his own behalf, his right to the effective assistance of counsel, and his right to be tried in a community free from prejudicial material consciously generated by official conduct, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, § 8 of the Connecticut Constitution.

(b) deprives defendant of his privilege against self-incrimination and assistance of counsel, as guaranteed by

With Respect to Questions Sought to be Reviewed, No. 7

the Fifth and Fourteenth Amendments to the Constitution; and

(c) deprives defendant of a hearing conducted with proper persons present.

WHEREFORE, defendant moves to dismiss the information.

Defendant

By F. OWEN EAGAN
His Attorney, appearing specially for purposes of Motion to Dismiss for Lack of Jurisdiction In Personam

(Filed: Sept. 23, 1969.)

ORDER

Sept. 23, 1969

The foregoing Motion, having been duly heard by the Court, it is hereby ordered denied.

By The Court (BARBER, J.)
Francis J. Butler, Clerk"

(Record, pp. 7-9).

c. Excerpt from State Supreme Court Record:

ASSIGNMENT OF ERRORS

The Court erred:

1. In denying the defendant's Motion to Quash Information dated August 29, 1969.

* * * * *

3. In denying the defendant's Motion to Dismiss dated September 19, 1969 * * * (Record, p. 213).

8. With Respect to Questions Sought to be Reviewed, No. 8:

"MOTION TO DISMISS

PART A

1. This prosecution is controlled and directed by the State's Attorney for New Haven County at Waterbury.

2. Pursuant to statute, the State's Attorneys of the State of Connecticut are appointed by the judges of the Superior Court, are responsible to the judges of the Superior Court, and are members of the Judicial Department. § 51-2, § 51-175, § 51-26, § 51-178, §54-75, § 51-12 (Conn. Gen. Stat., 1958 Rev., as amended); § 471, § 472, § 473 Practice Book (1963 Ed.).

3. As a matter of practice, the assignment of criminal cases for the purposes of motions, pleas, trial and disposition is made by the State's Attorney's Office, rather than by the clerk, who does maintain trial assignment lists and make assignments for civil cases, pursuant to provisions of the Practice Book.

4. Prosecution by the State's Attorney for New Haven County at Waterbury as a member of the Judicial Department with the powers and responsibilities enumerated:

(a) violates the separation of powers doctrine of Article II of the Connecticut Constitution and interferes with the operation of the Executive Department, which department, not the Judicial Department, has the function to take care that the laws be faithfully executed pursuant to Article IV, § 12 of the Connecticut Constitution; and

(b) deprives defendant of his right to have the issues in the above cause determined in an adversary, accusatorial proceeding in accordance with the due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, § 8 of the Connecticut Constitution.

With Respect to Questions Sought to be Reviewed, No. 8

WHEREFORE, defendant moves to dismiss the information.

* * * * *

Defendant

By F. OWEN EAGAN
His Attorney, appearing specially for purposes of Motion to Dismiss for Lack of Jurisdiction In Personam

(Filed: Sept. 23, 1969.)

ORDER

Sept. 23, 1969

The foregoing Motion, having been duly heard by the Court, it is hereby ordered denied.

By The Court (BARBER, J.)
Francis J. Butler, Clerk"

(Record, pp. 7, 9).

b. Excerpt from State Supreme Court Record:

"ASSIGNMENT OF ERRORS

The Court erred:

* * * * *

3. In denying the defendant's Motion to Dismiss dated September 19, 1969" * * * (Record, p. 213).